No. 87-107

FILED

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In the

Supreme Court of the United States

October Term, 1987

BRENDA PATTERSON,

Petitioner,

v.

McLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, MASSACHUSETTS, MINNESOTA, NEBRASKA, OREGON, SOUTH CAROLINA, TENNESSEE, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN and WYOMING and the COMMONWEALTH OF PUERTO RICO, THE DISTRICT OF COLUMBIA, GUAM and the VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici respectfully submit this brief in support of petitioner Patterson. *Amici* urge this Court to decline to re-examine *Runyon v. McCrary*, and thus reaffirm that § 1981 reaches private discriminatory conduct.

The eradication of racial discrimination remains a national goal of the highest order. *Amici* are the Attorneys General of forty-seven states and of Puerto Rico, Guam, and the Virgin Islands, and the highest legal officer of the District of Columbia. As chief law enforcement officers and representatives of government, *amici* have a strong interest in encouraging the perception of all their citizens that the laws will be administered with even-handedness, and particularly their minority citizens' belief that they can obtain meaningful redress under the law for discriminatory conduct. Moreover, States have an interest in the confidence of their citizens that once a rule of law is in place it will not be taken away absent compelling justification. This interest applies with particular force to the civil rights laws, which are properly characterized as conferring on minority citizens fundamental equality under law which was previously available only to white citizens. Overruling *Runyon* would remove substantial protections, thereby undermining public confidence that government – particularly the courts – will vigilantly enforce legal guarantees of equality.

The substantial progress made in overcoming this Nation's legacy of slavery has been achieved in large part because of the aggressive use by victims of discrimination of federal and state laws guaranteeing equality. Removing § 1981, the Nation's first civil rights law, from the array of available legal remedies for private discrimination could undermine this progress since state laws depend for their full effectiveness on their interaction with, and complementing of, federal law. The gap in available remedies which would be created by overruling *Runyon* would have to be filled by over forty individual States, and while ultimately it could be achieved, confusion and chaos would be the likely immediate result.

The citizens of this country have come to agree that no place exists for racism in the American marketplace. Private discrimination, unredressable by law, corrodes the body politic just as surely

as did publicly sanctioned discrimination in decades past. *Amici* submit that no compelling reason exists for overruling *Runyon* and that such a reversal would conflict with the prevailing sense of justice in this nation.

The States of New York and Massachusetts, by Attorneys General Robert Abrams and James M. Shannon, joined by Minnesota, Nebraska, Oregon, South Carolina, Tennessee, Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, Puerto Rico, the District of Columbia, Guam and the Virgin Islands as *amici* submit this brief pursuant to Supreme Court Rule 36.4.

SUMMARY OF ARGUMENT

For two decades it has been clear that 42 U.S.C. § 1981 prohibits private discrimination on the basis of race in the making of contracts. *Runyon* v. *McCrary*, 427 U.S. 160 (1976), reaffirmed the considered views of this and other courts that Congress intended § 1981 to reach private acts of discrimination.

Though neither the parties to this action nor the Solicitor General had urged a reexamination of *Runyon*, this Court *sua sponte* has suggested that the protections against racial, ethnic and religious discrimination that § 1981 affords might be discarded. Embarking on this course could cause substantial institutional and societal injury because, until now, the law of § 1981 has been settled to the satisfaction of the people as expressed by their elected officials and no compelling reason has appeared to upset it.

Section 1981 provides an array of remedies not available under other federal laws that bolster the efforts by governments and individuals to eradicate racial discrimination in wide ranging circumstances. Encouraged by the Court's broad reading of § 1981, and Congress's endorsement of the Court's construction, individuals and States have so frequently relied upon its protections that it is now a part of our legal fabric.

Adherence to the settled interpretation of the statute conforms with the national commitment to the eradication of invidious discrimination. Overruling it would cause unnecessary chaos and frustrate justified expectations. None of the considerations which have compelled the Court in prior cases to depart from a settled statutory interpretation suggests that *Runyon* needs reexamination. In order to conserve efforts dedicated to thwarting racial discrimination and to preserve the citizens' confidence that this is a nation of laws, this Court should not reconsider *Runyon*.

ARGUMENT

PRINCIPLES OF *STARE DECISIS* COUNSEL THAT THE INTERPRETATION OF 42 U.S.C. § 1981 ADOPTED BY THIS COURT IN *RUNYON* V. *McCRARY* SHOULD NOT BE RECONSIDERED

A. *Only the Most Compelling Circumstances Justify This Court's Abandonment of Firmly Established Statutory Precedents Since Congress Is Free to Correct Precedents That Are Wrong*

Prompted neither by the arguments of any party to this case nor by any pressing doctrinal or social exigency, this Court has asked whether a settled construction of a civil rights statute should be re-examined and jettisoned. Although *amici* are satisfied that a fresh look at the plain words of the act and at the historical context and legislative debates surrounding its adoption would compel the conclusion that § 1981 reaches private discriminatory conduct, we urge that the injury to society and the judicial system that are likely to attend a reconsideration counsel that this Court should not entertain the inquiry.

"[I]n a society governed by the rule of law," the doctrine of *stare decisis* "demands respect." *Solem* v. *Helm*, 467 U.S. 277, 311 (1983) (Burger, C.J., dissenting), quoting *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-20 (1983). *See also Phonetele* v. *ATT*, 664 F.2d 716, 753 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983) (Kennedy, J., dissenting) ("[W]e are first and foremost a nation of laws and the principle of *stare decisis* is the single most important key to the cohesiveness of our society.") Even as to constitutional questions, "any departure from the

doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984) (per O'Connor, J.)

Moreover, the Court has repeatedly recognized that "considerations of *stare decisis* are at their strongest when this Court confronts its previous construction of legislation." *Monell* v. *Department of Social Services*, 436 U.S. 658, 714 (1978) (Rehnquist, J., dissenting). Indeed, "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet* v. *Coronado Oil & Gas*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). And considerations of *stare decisis* weigh most "heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977) (per White, J.). Thus, only recently this Court reiterated that there is a "strong presumption of continued validity that adheres in the judicial interpretation of a statute." *Square D Company and Big D Building Supply Corp.* v. *Niagara Frontier Tariff Bureau*, 106 S. Ct. 1922, 1930 (1986). *See also NLRB* v. *Longshoremen*, 473 U.S. 61, 84 (1985). In order to overcome the presumption, it must "appear *beyond doubt*" that the Court's earlier interpretations "misapprehended the meaning of the controlling provision, before a departure from what was decided in those cases would be justified." *Monroe* v. *Pape*, 365 U.S. 167, 192 (1961) (Harlan, J., concurring). *See also Monell* v. *Dept. of Social Services*, 436 U.S. at 715 (Rehnquist, J., dissenting) (adopting Justice Harlan's standard as "the best exposition of the proper burden of persuasion" and stating "[o]nly the most compelling circumstances can justify this Court's abandonment of ... firmly established statutory precedents.")

These guideposts serve important institutional and societal imperatives. Adhering to *stare decisis* makes it possible for "citizens [to] have confidence that the rules on which they rely in ordering their affairs ..., are rules of law and not merely the opinions of a small group of men who temporarily occupy high office." *Florida Department of Health* v. *Florida Nursing Homes Association*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). Proper respect for this Court's judgments depends as much upon the appearance that they are rooted in impartial decisionmaking as upon a conviction that they are correct in an abstract sense. Giving

consideration to reversing the construction of a frequently invoked civil rights statute in circumstances where the personnel of the Court, and little else, has changed can undermine the esteem in which the public holds the judiciary.[1] The need for careful preservation of the confidence of citizens in the functions and processes of the Court can never be underestimated. Recent history teaches us that when those outside the Court seek to undermine that confidence, constitutional confrontations and social chaos will beset us. *See e.g. Cooper* v. *Aaron*, 358 U.S. 1 (1958).[2]

Continued devotion to a settled statutory construction also ensures that the Court acts properly within its sphere of powers. When the Court considers overruling its construction of a statute, it deals with a coordinate and majoritarian branch of government. That it must when called upon interpret a statute is beyond question. But once it so acts, it should be cautious not to encroach upon legislative functions vested in Congress by Article I of the

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[1] Because the five member majority voting to reconsider *Runyon* is comprised of *Runyon*'s dissenters and the three members to join the Court since then, the decision in this case is especially noteworthy. The principles of *stare decisis* are therefore particularly compelling here. *See generally* Wachtler, *Stare Decisis and a Changing New York Court of Appeals*, 59 St. John's L. Rev. 445 (1985).

[2] The rule of law, and not of men, is the very foundation of our constitutional government and it is to the judiciary that its preservation has been entrusted.

> [T]he Founders knew that law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. "Civilization involves subjection of force to reason and the agency of this subjection is law." (Pound, *The Future of the Law* (1937) 47 Yale L. J. 1, 13.) The conception of a government by laws dominated the thoughts of those who founded this nation and designed its Constitution ... To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be "as free, impartial, and independent as the lot of humanity will admit." So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige.

Cooper v. *Aaron*, 358 U.S. at 23-24 (Frankfurter, J., concurring) quoting *United States* v. *United Mine Workers*, 330 U.S. 258, 307-309 (1947) (concurring opinion).

Constitution.[5] When, as here, the Congress has ratified the interpretation this Court has placed upon a statute (See Part (B) (2) *post*), the Court, rather than challenging Congress to act again, should adhere to precedent. *Boys Market* v. *Clerks Union*, 398 U.S. at 258-259; *Monell* v. *Dept. of Social Services*, 436 U.S. at 716-17 (Rehnquist, J., dissenting).

Finally, abjuring the opportunity to reconsider long held views about the reach of a statute removes doubts about the continued vitality of other decisions construing similar statutory commands. Certainly, a reversal of the Court's views in *Runyon* v. *McCrary*, given the analysis the Court there employed in construing § 1981,[6] could cast doubt on the continued validity of its interpretation of § 1982 in *Jones* v. *Alfred H. Mayer, Co.*, 392 U.S. 409 (1968), and *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973).

Interpreting and determining the reach of a civil rights statute, like adjudication of rights secured by the Constitution, often requires the Court to undertake difficult redefinitions and line drawing, tasks that certainly confront the Court in this case as it first appeared here. But, settled rights cannot be jettisoned merely because their vindication in varying factual settings may

[5] As Justice Black observed in his dissenting opinion in *Boys Markets* v. *Clerks Union*, 398 U.S. 235, 250 (1970):

> [I]t is Congress, not this Court that is elected by the people. This Court should ... interject itself as little as possible into the law-making and law-changing process. Having given our view on the meaning of a statute, our task is concluded, absent extraordinary circumstances. When the Court changes its mind years later, simply because the judges have changed, in my judgment it takes upon itself the function of the legislature.

[6] In *Runyon*, the Court observed that the view that § 1981 does not reach private acts of discrimination "is wholly inconsistent with *Jones*' interpretation of the legislative history of § 1 of the Civil Rights Act of 1866, an interpretation that was reaffirmed in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, and again in *Tillman* v. *Wheaton-Haven Recreation Assn.*, *supra*. And this consistent interpretation of the law necessarily requires that § 1981, like § 1982, reaches private conduct." 427 U.S. at 173.

be difficult.[7] Were this Court to retract its decisions in every case involving difficult statutory construction, it would introduce intolerable uncertainty not only into civil rights law, but into all our affairs. *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 819 n.5 (1984) ("The principle of *stare decisis* gives rise to and supports ... legitimate expectations, and where our decision is subject to correction by Congress, we do a great disservice when we subvert these concerns and maintain the law in a state of flux.").[8] In a nation founded on the institutions of slavery and dedicated only in the last generation to a policy that would "eliminate so far as possible the last vestiges of an unfortunate and ignominious page in this country's history," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975), a retreat from settled practices could be a particularly significant signal for new disorder.

Nothing in this Court's April 25, 1988 order suggests that the Court will be unmindful of the interests served by *stare decisis*. *Patterson* v. *McLean Credit Union*, ___ U.S. ___ (April 25, 1988) (per curium). Thus, those who would propose a detour "from the straight path of *stare decisis*" in this case bear the "heavy burden" of demonstrating "that changes in society or in the laws dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986). While there are circumstances where the need for consistency in the application of the law and stability in society call for a

[7] Indeed, in another context this Court endorsed the view that the withdrawal of protection accorded by statute against private discriminatory conduct was an encouragement to discriminate that violated rights secured by the equal protection clause of the Fourteenth Amendment. *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

[8] *See also*, Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735-36 (1949):

> Uniformity and continuity in law are necessary to many activities. If they are not present, the integrity of contracts, wills, conveyances and securities will be impaired. And there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon. *Stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence. *Stare decisis* serves to take the capricious elements out of law and to give stability to a society. It is a strong tie which the future has to the past.

departure from *stare decisis*, careful observation leads *amici* to the conclusion that the application of § 1981 to private discriminatory conduct neither conflicts with national policies nor injects any irreconcilable doctrinal conflicts into the law suggesting that *Runyon* v. *McCrary* needs reexamination.

B. *Section 1981 Has Become Part of the Fabric of Legal Protections Afforded Racial and Ethnic Minorities Through Its Interpretation by the Courts, Congress' Ratification of that Construction, and Reliance By Individuals and States*

1. *This Court's Decisions in* Runyon *and its Progeny Have Encouraged a Broad Usage of Section 1981.*

On at least five occasions[7] in the last twelve years, this Court has been called upon to give meaning to section 1981.[8] None of those cases has signalled a retreat from the determination in *Runyon* that § 1981 reaches all intentional racial discrimination, public and private, that interferes with the right to contract. Rather, the Court has consistently stood by that decision and, by applying it in varying circumstances, underscored its broad applicability.[9]

The Court's opinions in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and *Runyon* v. *McCrary*, 427 U.S. 160 (1976)

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[7] *Goodman* v. *Lukens Steel Company*, 482 U.S. ____, 107 S. Ct. 2617 (1987); *St. Francis College* v. *Al-Khazraji*, 481 U.S. ____, 107 S. Ct. 2022 (1987); *General Building Contractors Assn.* v. *Pennsylvania*, 458 U.S. 100 (1981); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Runyon* v. *McCrary*, 427 U.S. 160 (1976).

[8] 42 U.S.C. § 1981 states, *inter alia*:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, ... as is enjoyed by white citizens ...

[9] At the same time, the Court has never departed from its determination reached in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that § 1982, the statutory twin of § 1981, reaches private discriminatory interferences with property rights. *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. ____, 107 S. Ct. 2019 (1987); *Memphis* v. *Greene*, 451 U.S. 100 (1981); *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).

demonstrate, based upon the language of 42 U.S.C. § 1981 and its legislative history, that the statute prohibits private discrimination in the making of contracts. While the States leave the full exposition of that argument to the Petitioner, we urge the Court to stand by that conclusion. Indeed, each of the questions necessary to the holding that § 1981 reaches private conduct has been " 'considered maturely and recently' by this Court," *Monell* v. *Dept. of Social Services*, 436 U.S. at 714 (Rehnquist, J., dissenting) quoting *Runyon* v. *McCrary*, 427 U.S. at 186 (Powell, J., concurring).[*]

First, the Court in recent times has never intimated that the language of § 1981 indicates a congressional intent to allow private discrimination. The touchstone of statutory interpretation has always been the statute itself. *E.g.*, *Kelly* v. *Robinson*, 479 U.S. ____, ____, 107 S. Ct. 353, 358 (1987). In discussing the statute from which section 1981 is derived, the Court has twice stated that the "[1866] Act was designed to do *just what its terms suggest*: to prohibit all racial discrimination, whether or not under color of law ..." " *Runyon* v. *McCrary*, 427 U.S. at 170 quoting *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 436 (emphasis added). A fresh look at the statute does not alter the conclusion that its plain terms do not limit its reach to state action.[*]

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[*] In *Monell*, an important reason for the Court's holding that the high burden for overruling statutory precedent had been met was that in no prior case had there been a "full airing of all the relevant considerations." *Id.* at 709 n.6 (Powell, J. concurring). While Justice Rehnquist argued that *stare decisis* indicated that the Court should follow *Monroe* v. *Pape*, he did not dispute that the issue had never been fully canvassed. Rather, he contended that other concerns of *stare decisis* predominated. *Id.* at 718. In contrast, the history of both the Act of 1866, as reenacted in 1870 and codified in 1874, and its constitutional girders, received extensive treatment by the majorities and dissenters in *Jones* and *Runyon* informed not only by the analysis of the parties but also by sixteen *amici* briefs, including the United States'.

[*] Justice White's dissent in *Runyon* obviously reads the statute differently. While he provides support for much of his opinion, his assertion about the language of section 1981 that "what it says" does "no more" than "outlaw[] any legal rule disabling any person from making or enforcing a contract, but does not prohibit private racially motivated refusals to contract," *Runyon* v. *McCrary*, 427

(footnote continued)

Second, the Court has concluded that it was the intent of the Congress that § 1981 reach both private and public racial discrimination in the making of contracts. *Runyon* v. *McCrary*, 427 U.S. at 169-171; *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 450, 460-61; 465-66 (1975); *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. at 439-40 and n.11. The legislative intent holding has been based upon the plenary review of the historical materials by the Court in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 422-37. *See, e.g., Runyon* v. *McCrary*, 427 U.S. at 170-72. The Court's reliance on *Jones*' careful consideration of the legislative history is appropriate, once the origin of § 1981 in the 1866 Act is accepted, since §§ 1981 and 1982 were section 1 of the very same Civil Rights Act of 1866. It is therefore clearly not "beyond doubt" based on the legislative history that prior decisions have been wrong about section 1981. *Runyon* v. *McCrary*, 427 U.S. at 168-70 and n.8; *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. at 286; *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. at 439; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 422 n.28, 441 n.78; *see St. Francis College* v. *Al-Khazraji*, 107 S. Ct. at 2027; *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 390 n.17.

Third, the Court has carefully considered whether § 1981 was enacted pursuant to the Thirteenth or the Fourteenth Amendment and concluded "that section 1981, because it is derived in part from the 1866 Act, has roots in the Thirteenth as well as the Fourteenth Amendment." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 390 n.17 (1982); *Runyon* v. *McCrary*, 427 U.S. at 168 n.8; *Id.* at 190 (Stevens, J., concurring); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 441 n.78; *see Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. at 439-40. That conclusion has been based on a comprehensive

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U.S. at 195 (White, J., dissenting), is conclusionary and, at most, points only to an ambiguity in that language. *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 421-425. Surely the Reconstruction era Congress that enacted § 1981, at least, intended to thwart any attempt to reimpose slavery in any guise. It would have expected this broadly worded statute to reach refusals to employ any of the newly freed slaves unless they agreed to conditions of employment that mirrored their prior condition of servitude.

review of the relevant historical materials regarding the origins of § 1981.

Fourth, the Court has been clear, at least since *Jones*, " 'that the power vested in Congress to enforce [the Thirteenth Amendment] by appropriate legislation' ... includes the power to enact laws 'direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.' " *Runyon* v. *McCrary*, 427 U.S. at 179 quoting *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 438 (citation omitted).

In the course of examining the legislative and constitutional underpinnings of § 1981, the Court has applied it expansively to permit its use as a remedy for private discrimination in a wide array of circumstances. Even before the Court decided in *Runyon* that § 1981 can be invoked to redress a race-based denial of admission by a private, commercial, non-sectarian school, all nine members then on the Court agreed that the statute reaches private refusals to enter into employment contracts. *Johnson* v. *Railway Express Agency*, 421 U.S. at 459 (per Blackmun, J., joined by Burger, C. J. and Stewart, White, Powell and Rehnquist, J.J.) ("[I]t is well settled among the Federal Courts of Appeals -- and we now join them -- that § 1981 affords a federal remedy against discrimination in private employment on the basis of race"); 468-76 (Marshall, J. joined by Douglas and Brennan, J. J., concurring in part and dissenting in part). In *McDonald* v. *Santa Fe Trails Transp. Co.*, the Court embraced the conclusion that white persons, like blacks, can invoke its protections because "the Act was meant ... to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." 427 U.S. at 295. Four years later, every member of the Court considering whether a claim under § 1981 requires a demonstration of discriminatory intent agreed that the prohibitions of § 1981 "encompass private as well as governmental action" motivated by race. *General Building Contractors Assn.* v. *Pennsylvania*, 458 U.S. at 387-88 (per Rehnquist, J., joined by Burger, C. J., and White, Blackmun, Powell, O'Connor and Stevens, J.J.); 403-05 (O'Connor, J., concurring); 405-06 (Stevens, J., concurring); 407-418 (Marshall, J., joined by Brennan, J., dissenting).

Only last term, the Court was unanimous that § 1981 forbids all racial discrimination in the making of private contracts when "[b]ased on the history of § 1981" it had "little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *St. Francis College* v. *Al-Khazraji*, 481 U.S. at ____, 107 S. Ct. at 2028. And again, several weeks later, no Justice disagreed with the conclusion of the plurality in a union membership case that "a collective bargaining agent could not, without violating ... § 1981, follow a policy of refusing to file grievable racial discrimination claims however strong they might be and however sure the agent was that the employer was discriminating against blacks." *Goodman* v. *Lukens Steel Co.*, 482 U.S. at ____, 107 S. Ct. at 2625.[a]

In addition to giving § 1981 an extensive substantive reach, the Court has woven *Runyon* into other, related areas of law. Thus, when the Court held that a private college that engages in racial discrimination cannot claim a charitable exemption from tax laws because "racial discrimination in education violates a most fundamental national policy", it relied on *Runyon* and other cases. *Bob Jones University* v. *United States*, 461 U.S. 574, 594 (1983). Similarly, Justices relied on *Runyon*'s recognition that Congress enacted § 1981 pursuant to its powers under the Thirteenth Amendment when sustaining congressional action requiring set-asides for minority business enterprises in federally funded construction programs. *See Fullilove* v. *Klutznick*, 448 U.S. 448, 500 (1980) (Powell, J., concurring). And, *Runyon*'s holding that Congress has prohibited private discrimination supports the Court's decisions that those who would discriminate in private relations can find no refuge in the Constitution from other legislation forbidding such conduct. *E.g. Roberts* v. *United States Jaycees*, 468

[a] Those Justices who dissented from the Court's judgment in *Goodman* holding the union liable for racial refusals to process grievances did so not because of any expressed doubt that § 1981 encompasses such a claim but because on the record presented they could not conclude that the union intended to discriminate against black members. *Id.*, 482 U.S. at ____, 107 S. Ct. at 2633-34 (Powell, J., joined by Scalia and O'Connor, J.J., concurring in part and dissenting in part).

U.S. 609, 628 (1984); *Hishon* v. *King & Spaulding*, 467 U.S. 69, 78 (1984). Embarking on an effort to discern anew the intent of Congress 120 years ago would call into question the legitimacy of rights and remedies recently upheld by this Court in some of its most significant decisions.

2. *Congress Has Ratified And Relied Upon* Runyon's *Decision That Section 1981 Prohibits Private Racial Discrimination.*

It is now familiar history, chronicled at length in *Runyon*, that Congress has considered and rejected legislation "that would have repealed the Civil Rights Act of 1866 ... insofar as it affords private sector employees a right of action based on racial discrimination in employment." *Runyon* v. *McCrary*, 427 U.S. at 174 and n.11.[a] The Court was moved by the Senate's rejection of the proposal to observe that "[t]here can hardly be a clearer indication of congressional agreement with the view that § 1981 *does* reach private acts of racial discrimination." *Id.* (emphasis in original).

Similar ratifications have occurred with other civil rights legislation in subsequent years. In considering legislation to amend the Equal Credit Opportunity Act of 1974, 15 U.S.C. § 1691, to prohibit discrimination on the basis of race and other grounds in the granting of credit, the House heard testimony that § 1981 already accorded protection against racial refusals to extend credit.[a] Although specifically advised that § 1981 reaches

[a] As explained by the Court, Senator Williams, the floor manager of the bill that was enacted as the Equal Employment Opportunity Act of 1972, described Senator Hruskas' amendment to make Title VII and the Equal Pay Act the exclusive federal sources of relief for employment discrimination as an effort to " 'strip from [the] individual his rights that have been established going back to the first Civil Rights Act of 1866.' " *Id.*, quoting 118 Cong. Rec. 3371, 3372 (1972).

[a] In hearings on the bill before the Subcommittee on Consumer Affairs of the House Committee on Banking, Currency and Money, Arthur S. Flemming, Chairman of the United States Civil Rights Commission, testified:

> Minority groups citizens theoretically would seem to be afforded protection against credit discrimination by the Civil Rights Act of

(footnote continued)

private discriminatory refusals to contract,[8] when the amendments to the Equal Credit Opportunity Act were enacted in 1976, Congress chose not to repeal or modify the judicial construction this and other courts had given § 1981.[9]

In 1976, after *Runyon*, Congress again endorsed this Court's construction of § 1981 when it enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. In explaining the purpose of the amendment as giving the federal courts discretion to award attorneys' fees in suits brought to enforce the civil rights acts which Congress has passed since 1866, Congress specifically observed that the Act of 1866 covered the same ground as later

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1866 which forbids discrimination in contractual transactions and declares 'that all citizens have equal rights to "inherit, purchase, lease, sell, hold, and convey real and personal property." Experience of more than a century however, amply demonstrates that the broad protections of the Civil Rights Act of 1866 are insufficient to effectively guarantee minority citizens equal credit opportunities.

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Hearings Before the Subcommittee on Consumer Affairs of the Committee on Banking, Currency and Money, House of Representatives, 94th Congress, 1st Sess., on H.R. 3386, p. 41 (G.P.O. 1975). In addition, Dr. Flemming testified that the prohibitions proposed in the amendments would overlap with those contained in section 805 of the Fair Housing Act of 1968, 42 U.S.C. § 3605, against racial discrimination in mortgage financing. *Id.* at p. 46 ("Unlike Title VIII of the Civil Rights Act of 1968, H.R. 3386 forbids discrimination based on race ... in all areas of credit, not just mortgage finance.")

[8] At the time Chairman Flemming testified, April, 1975, at least seven circuit courts of appeals had held that § 1981 reaches private race discrimination, *see Johnson* v. *Railway Express Agency*, 421 U.S. at 459 n.6, and *Jones* v. *Alfred H. Mayer Co.*, was settled law in this Court.

[9] Congress did, however, require persons aggrieved by housing related credit discrimination to choose between the remedies afforded by the credit amendments and the Fair Housing Act. *See* 15 U.S.C. § 1691e(i):

> No person aggrieved by a violation of this subchapter and by a violation of section 3605 of Title 42 shall recover under this subchapter and section 3612 of Title 42, if such violation is based on the same transaction.

enacted civil rights statutes and, by making attorneys' fees available, acted to strengthen its protections.[10]

Congress time and again has ratified the judicial determination that the 39th Congress intended § 1981 to reach private discrimination. *Cf. Lindahl* v. *OPM*, 470 U.S. 748, 782 n.15 (1985) (" 'Congress is presumed to be aware of [a] ... judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change ....' "). Indeed, it is apparent that Congress has relied and built on *Jones*, *Runyon* and their progeny in enacting other statutes. If Congress had any inclination to overrule *Runyon*, it has had ample opportunity to do so. Moreover, it has foregone countless opportunities to pass legislation containing protections of the kind § 1981 is understood to contain based on its view that there was no need to enact such a law. Proper deference to congressional endorsements of judicial interpretations of its acts requires this Court to abstain from challenging Congress to act once more.

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[10] *See* S. Rep. No. 94-1011, 94th Cong., 2d Sess., 4 reprinted at 1976 U.S. Code Cong. & Admin. News 5908, 5911:

> [F]ees are ... suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights.

The Senate Report demonstrates Congress' determination to make attorneys' fees available to prevailing plaintiffs in actions under the Civil Rights Act of 1866 to redress private discrimination, and its express approval of the construction of that act to reach private conduct. The Report specifies that the Fees Act would overrule the Court's disapproval of fee awards in cases of private discrimination cited in *Aleyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 270 n.46 (1975) (disapproving fee awards *inter alia* in *Knight* v. *Auciello*, 453 F.2d 852 (1st Cir. 1972) and *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971) which both permitted fees in actions under § 1982 to redress private housing discrimination). *Id.*, at 5911-12 and n.3.

3. *Individuals and States Have Relied Upon Section 1981 to Secure Redress For Invidious Race Discrimination in Its Myriad Forms.*

Suits under § 1981 to redress racial discrimination are now commonplace; their sheer numbers reflect the centrality of the statute to our legal fabric. The lower courts have developed a body of law interpreting § 1981 that enables individuals to obtain remedies not available under Title VII. That such a development would occur was foretold by the Court's recognition in *Johnson v. Railway Express Agency*, 421 U.S. at 461 that the "remedies available under Title VII and under § 1981, although related, ... are separate, distinct and independent."

While courts fashioning equitable remedies under § 1981 can require relief similar to that available under Title VII, such as hiring, promotion, reinstatement, retroactive seniority and affirmative action,[*] § 1981 covers all employers, not just those with fifteen or more employees. A § 1981 plaintiff can obtain legal remedies not available under Title VII. "An individual who establishes a cause of action under § 1981 is entitled to ... legal relief, including compensatory, and under certain circumstances, punitive damages." *Id.*, 421 U.S. at 460. Thus, individuals prevailing under § 1981, unlike those pursuing Title VII claims, may recover for the mental distress that results from the racial discrimination.[*] Courts may award punitive damages for serious violations of § 1981.[*] A backpay award under § 1981 is not limited

[*] *See e.g. Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979); *Campbell v. Gadsden School Dist.*, 534 F.2d 650 (5th Cir. 1976); *Easley v. Anheuser-Busch, Inc.*, 572 F. Supp. 402 (E.D. Mo. 1983), *aff'd in part and rev'd in part*, 758 F.2d 251 (8th Cir. 1985).

[*] *E.g., Williams v. Trans World Airlines*, 660 F.2d 1267, 1272-73 (8th Cir. 1981); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977).

[*] *E.g., Beauford v. Sisters of Mercy-Province of Detroit*, 816 F.2d 1104, 1108-09 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 250 (1988); *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1425 (7th Cir. 1986); *Stallworth v. Shuler*, 777 F.2d 1431, 1435 (11th Cir. 1985); *Clairborne v. Illinois Cent. R.R.*, 583 F.2d 143 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 881 (1977).

to the two year limitation specified for Title VII, *id.*, but rather is governed by the analogous personal injury limitation period provided by the law of the state where the action is commenced. *Goodman v. Lukens Steel Co.*, 107 S. Ct. at 2621.[*] Moreover, because a § 1981 plaintiff, unlike one pursuing only Title VII relief, may be entitled to legal relief, he can demand a jury trial.[*]

The statute has been employed to redress racial discrimination relating to contracts in numerous contexts other than employment. *Runyon* approved its applicability to private schools and it has since been employed by those seeking to redress discrimination in education.[*] Individuals have invoked it to vindicate the right to non-discriminatory access to restaurants,[*] clubs,[*] and recreational facilities[*] where the other applicable federal law does not provide for monetary damages. *See* 42 U.S.C. § 2000a—3. It has been utilized to challenge racial denials of

[*] However, there may be individuals who have foregone Title VII actions, which are subject in most instances to a 300-day administrative filing period, *see* 42 U.S.C. § 2000e-5(e), only to find that the right to federal relief is lost if *Runyon* is overruled.

[*] *Edwards v. Boeing Vertol*, 717 F.2d 781, 783 (3d Cir. 1983), *vacated on other grounds*, 468 U.S. 1201 (1984); *Setser v. Novack Inv. Co.*, 638 F.2d 1137 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981); *Moore v. Sun Oil Co.*, 636 F.2d 154 (6th Cir. 1980).

[*] *See Riley v. Adirondack Sch. for Girls*, 541 F.2d 1124 (5th Cir. 1976); *Phelps v. Washburn University of Topeka*, 632 F. Supp. 455 (D. Kansas 1986).

[*] *See Wyatt v. Security Inn Food & Beverage, Inc.*, 819 F.2d 69 (4th Cir. 1987) (affirming jury award of $10,000 in damages); *Hernandez v. Erlenbush*, 368 F. Supp. 752 (D. Ore. 1973).

[*] *See Sullivan v. Little Hunting Park*; *Wright v. Salisbury Club, LTD.*, 632 F.2d 309 (4th Cir. 1980).

[*] *See Oltman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974); *Scott v. Young*, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); *Durham v. Red Lake Fishing & Hunting Club*, 666 F. Supp. 954 (W.D. Tex. 1987).

housing opportunities,[27] utility services,[28] and access to roads.[29] Others have sought remedies for racial discrimination in access to insurance coverage[30] and medical treatment.[31] And it has been used by those seeking relief from racial discrimination in commercial ventures,[32] franchise relationships,[33] and banking transactions.[34]

States, like individuals, have invoked § 1981 to redress private racial discrimination. In fact, one of the cases under § 1981 to reach this Court, *General Building Contractors Assn. v. Pa.*, was an effort by a state, acting as *parens patriae*, to seek redress for racial discrimination in private employment. Likewise, New York frequently has proceeded under § 1981 as *parens patriae* for relief

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[27] *See Marable v. H. Walker & Associates*, 644 F.2d 300 (5th Cir. 1981); *Quintonna v. Newrie*, 110 F.R.D. 246 (E.D.N.Y. 1986); *Jiminez v. Southridge Co-op. Section I*, 626 F. Supp 732 (E.D.N.Y. 1985); *Bendetsen v. Pagano*, 534 F. Supp 539 (D. Mass. 1982). *But see Spann v. Colonial Village Inc.*, 662 F. Supp. 541, 547 (D. D.C. 1987) (§ 1981 *not available to redress racially discriminatory real estate advertising*); *Saunders v. General Services Corp.*, 659 F. Supp. 1042, 1062-63 (E.D. Va. 1986) (same).

[28] *See Cody v. Union Electric*, 518 F.2d 978 (8th Cir. 1975).

[29] *Compare Jennings v. Patterson*, 488 F.2d 436 (5th Cir. 1974) *with Memphis v. Greene*, 451 U.S. 100 (1981).

[30] *See Sims v. Order of United Commercial Travelers of America*, 343 F. Supp. 102 (D. Mass 1972). *But see Mackey v. Nationwide Ins. Companies*, 724 F.2d 419 (4th Cir. 1984).

[31] *Hall v. Bio-Medical Application, Inc.*, 671 F.2d 300 (8th Cir. 1982); *Taylor v. Flint Osteopathic Hosp. Inc.*, 561 F. Supp. 1152 (E.D. Mich. 1983).

[32] *See Fraser v. Doubleday & Co. Inc.*, 587 F. Supp. 1284 (S.D.N.Y. 1984); *Vietnamese, Etc. v. Knights of K.K.K.*, 513 F. Supp. 993 (S.D. Tex. 1981); *Howard Sec. Serv. v. Johns Hopkins Hospital*, 526 F. Supp. 509, 513 (D. Md. 1981).

[33] *See Quarles v. GMC (Motor Holding Div.)*, 758 F.2d 839 (3d Cir. 1985); *Saul v. Import Motors Limited, Inc.*, 379 F. Supp. 1064 (W.D. Mich. 1974).

[34] *See Hall v. Pennsylvania State Police*, 570 F.2d 86, 92 (3d Cir. 1978).

from a pattern and practice of private housing discrimination.[35] In addition, both Massachusetts and California provide civil causes of action under state statute[36] for conduct violating § 1981 and have sued under the statutes to redress acts of racial harassment. The applicability of § 1981 to private conduct has strengthened state anti-discrimination efforts.[37]

State courts have widely received § 1981 as a means for redressing racial discrimination in private contracts.[38] Recently, in *Smith v. United Technologies, Essex Group*, 731 P.2d 871 (Kan. 1987), the Kansas Supreme Court affirmed a jury award of $55,000 in compensatory and punitive damages to a black employee who sued under § 1981 for his discharge from employment in retaliation for having filed a discrimination charge with the Kansas Commission on Civil Rights. In *Brant Const. Co. v. Lumen Const. Co.*, 515 N.E.2d 868 (Ind. App. 3 Dist. 1987), the court affirmed a determination under § 1981 that a prime contractor, because of race, had interfered with and rendered insolvent a subcontractor's business by wrongfully exercising control over the

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[35] *See e.g., People of the State of New York v. Merlino*, 88 Civ. 3133 (S.D.N.Y.); *People of the State of New York v. LaRosa Realty, Inc.*, Civ. Action No. CV-85-4459 (E.D.N.Y.) (*Judgment for $15,000 in damages for racial steering*); *People of the State of New York v. Mahler Realty*, Civ. Action No. CV-85-4490 (*Judgment for $14,000 for racial steering*); *People of the State of New York v. Data-Butterfield Inc.*, Civ. Action No. 80-305 (E.D.N.Y.) (*Judgment for $142,000 for racial steering*).

[36] *See* Mass. Gen. Laws Ann. Ch. 12 §§ 11H, 11I, 11J; Cal. Civil Code § 52.1 (West 1968).

[37] In addition, guided in part by *Runyon*'s teaching that discrimination in private contracts is proscribed by § 1981, states have initiated race-conscious set-aside programs to create opportunities for minority business enterprises. *See e.g.*, N.Y. Exec. Order 22 (1983); N.Y. Pub. Auth. Law § 1798-c 14(a)(i) (McKinney 1986); N.Y. Transp. Law § 420(2) (McKinney 1983); N.Y. Uncons. Laws § 6207 (McKinney 1983); Mass. Gen. Laws Ann. Ch. 23A § 39-44 (West Supp. 1988) and Mass. Exec. Order No. 237, Mass. Admin. Reg. 509 (1984).

[38] This Court has observed that state courts may entertain claims under the Civil Rights Act of 1866. *Sullivan v. Little Hunting Park*, 396 U.S. at 238.

subcontractor's finances and intimidating the subcontractor's employees into leaving the job site. The subcontractor was awarded compensatory damages for lost profits, punitive damages and attorneys' fees. In *McKnight* v. *General Motors Corp.*, 420 N.W.2d 370 (Wis. App. 1987), the court set forth standards for the determination under § 1981 of employment discrimination suits in Wisconsin courts. Courts in other states have likewise entertained § 1981 employment discrimination claims.[8] And state courts have recognized the special role the Civil Rights Act of 1866 plays in assuring equal access to private housing and places of public accommodations.[9] Section 1981 thus has become in the state courts, as in the federal courts, an important tool for eliminating the badges and incidents of slavery.

Removing § 1981 from the arsenal of civil rights enforcement weapons could, in fact, create gaps in the availability of remedies to redress private discrimination and thereby undermine efforts to eliminate private racial discrimination. Not all of the states have enacted laws prohibiting racial discrimination.[10] In addition, most state fair employment laws, like Title VII, do not cover all employers. The fair employment statutes of twelve states are essentially coextensive with Title VII insofar as they prohibit racial discrimination only by those employers with fifteen or more employees.[11] Most other state statutes have jurisdictional limits

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[8] *See e.g. Spencer* v. *McCarley Moving & Storage*, 330 S.E.2d 753 (Ga. App. 1985); *Calhoun* v. *Lang*, 604 S.W.2d 740 (Mo. App. 1980).

[9] *See Mauvais* v. *Wokocha*, 469 So. 2d 274 (La. App. 4 Cir. 1986); *Hawthorne* v. *Realty Syndicate, Inc.*, 259 S.E.2d 591 (N.C. App. 1979); *Madison* v. *Cinema I*, 454 N.Y.S.2d 226 (Civil Court of City of New York, N.Y. Co. 1982).

[10] Statutory provisions of general application concerning equal employment opportunities are absent in four states. *See* 3 Empl. Prac. Guide (CCH) ¶¶ 30,006 (Alabama), 30,008 (Arkansas), 31,808 (Georgia), 34,008 (Mississippi). Employees not protected by Title VII in these states may have no remedy for racial discrimination in private employment. Additionally, North Carolina and Virginia statutes provide for conciliation of charges of private employment discrimination, but create no causes of action. *See* N.C. Gen. Stat. § 143-422.1 *et seq.* (1983); Va. Code Ann. § 2.1-714 *et seq.* (1987).

[11] *See* Ariz. Rev. Stat. Ann. § 41-1461 (1982); Fla. Stat. Ann. § 760.02 (West 1985); Ill. Ann. Stat. ch. 68, para. 2-101 (Smith-Hurd 1987); La. Rev. Stat. Ann.

(footnote continued)

that approach those contained in the federal law.[12] Not all such statutes provide the comprehensive set of remedies available under § 1981. An overruling of *Runyon* could therefore create a gap in the availability of remedies for racial discrimination in private employment — where none has existed for nearly two decades — that could be filled only by the action of nearly forty state legislatures or Congress. It could without similar legislative reform also leave unredressable racial refusals to contract in many other contexts. *See* pp. 17-20, *ante*.

While there is no doubt about the power of the states to enact legislation modeled after § 1981 as construed in *Runyon*, the period during which legislatures were acting to do so and administrative agencies were re-tooling to entertain new kinds of charges would certainly be one of confusion or chaos. Overruling *Runyon* would disable an important legal means for obtaining effective relief from discrimination in numerous areas of life. Such a withdrawal of rights would frustrate widely held expectations about the courts' role in redressing racial injustice.

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§ 23:1006 (West 1985); Md. Ann. Code art. 49B, § 15 (1986); Neb. Rev. Stat. § 48-1102 (1984); Nev. Rev. Stat. § 613.330 (Michie 1986); N.M. Stat. Ann. § 28-1-2 (Supp. 1986); Okla. Stat. Ann. tit. 25 § 1301 (West 1987); S.C. Code Ann. § 1-13-30 (Law Co-op. 1986); Tex. Rev. Civ. Stat. Ann. art. 5221k (Vernon 1987); Utah Code Ann. § 34-35-2 (1988).

[12] *See* Cal. Govt. Code § 12926 (West. 1986) (five or more employees); Conn. Gen Stat. Ann § 46a-51 (West 1986) (three or more); Del. Code Ann. tit. 19, § 710 (1985) (four or more); Idaho Code § 67-5902 (Supp. 1987) (ten or more); Kan. Stat. Ann. § 44-111 (1986) (four or more); Ky. Rev. Stat. Ann. § 344.030 (Michie 1983) (eight or more); Mass. Gen. L. ch. 151B § 1 (1986) (six or more); Mo. Ann. Stat. § 213.010 (Vernon 1986) (six or more); N.H. Rev. Stat. Ann. § 354-A:3 (1984) (six or more); N.Y. Exec. Law § 292 (McKinney 1982) (four or more); N.D. Cent. Code, chapt. 14-02.4 (ten or more); Ohio Rev. Code Ann. § 4112.01(a)(2) (Anderson 1986) (four or more); Pa. Stat. Ann. tit. Labor-Legal Notice § 954(b) (Purdon 1986) (four or more); Tenn. Code Ann. § 4-21-102 (1985) (eight or more); Wash. Rev. Code Ann. § 49.60.040 (1987) (eight or more); W. Va. Code § 5-11-3(d) (1987) (twelve or more).

C. *The Considerations Which Allow An Overruling of Statutory Precedent Do Not Call For A Reexamination of Runyon*

A review of the decisions in which the Court has overruled prior statutory interpretations reveals that the Court has done so only in those rare circumstances in which adherence to precedent serves to undermine the values of fairness, predictability, stability and efficiency. Historically, the Court has reversed a statutory construction only where changes in society dictate such a departure, where intervening events undermine a precedent's validity or make it difficult to apply, or where application of a prior construction works to deny substantial rights.[*] These circumstances do not apply to the Court's decision in *Runyon*.

1. *The Court's Construction of Section 1981 in* Runyon *is Consistent With a National Consensus Favoring the Elimination of Racial Discrimination From All Sectors of Society.*

It is well recognized that "when a rule after it has been duly tested by experience has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment...." B. Cardozo, The Nature of the Judicial Process 149 (1921). Application of that policy in this case, however, requires adherence to precedent, since the Court's interpretation in *Runyon* now, more than ever, is consistent with the national policy to eradicate both private and public discrimination.

In *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), this Court recognized that race discrimination violates "deeply and widely accepted views of elementary justice" and "fundamental public policy." *Id.* at 592-93. There the Court unequivocally held that that public policy applies with special force to educational institutions, even in the private sector:

[*] *See, e.g., Monell* v. *New York City Department of Social Service*, 436 U.S. 658 (1978); *Continental T.V.* v. *GTE Sylvania*, 433 U.S. 36 (1977); *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 305 (1976); *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *Andrews* v. *Louisville and Nashville R. Co.*, 406 U.S. 320 (1972); *Boys Market Inc.* v. *Retail Clerks*, 398 U.S. 235 (1970); *Peyton* v. *Rowe*, 391 U.S. 54 (1968).

> Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education. Given the stress and anguish of the history of efforts to escape from the shackles of the "separate but equal" doctrine of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising "beneficial and stabilizing influences in community life"....
>
> Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination is contrary to public policy.

Id. at 595 (citation omitted). Without question, an integral step in the development of this national policy was the Court's interpretation in *Runyon* that nothing less than non-discrimination in private education would fulfill congressional efforts to effectuate the Thirteenth and Fourteenth Amendments. By overruling *Runyon*, the Court would remove the principal federal rule of law that affords a remedy for discrimination in private education, a result which cannot be reconciled with the Court's historic role in forging a national consensus that racial equality requires equal access to education.

Indeed, in less than two generations, virtually every state has adopted a public policy recognized in judicial or legislative action disfavoring private racial discrimination.[*] Like the extensive

[*] *See e.g. Hyatt Corp.* v. *Honolulu Liquor Com'n*, 730 P.2d 1293, 1308-09 (Hawaii 1987); *Brown* v. *Superior Court*, 691 P.2d 272, 277 (Cal. 1984); *Miller* v. *C.A. Muer Corp.*, 362 N.W.2d 650, 653 (Mich. 1984); *Maine Human Rts. Com'n* v. *Canadian Pacific*, 450 A.2d 1225, 1229-30 (Me. 1983); *Kentucky Com'n on Human Rights* v. *Fraser*, 625 S.W.2d 852, 855 (Ky. 1982); *Eastman Kodak* v. *Fair Empl. Prac. Com'n*, 420 N.E.2d 877, 879 (Ill. 1981); *City of Minn.* v. *Richardson*, 239 N.W.2d 197, 205 (Minn. 1976); *Evening Sentinel* v. *NOW*, 357 A.2d 498, 503 (Conn. 1975); *Jackson* v. *Concord Co.*, 253 A.2d 793, 798-99 (N.J. 1969); *Penn. Human Rel. Com'n* v. *Chester School Dist.*, 233 A.2d 290, 298 (Pa. 1967); Neb. Rev. Stat. Ann. § 48-1101 (1984); N.Y. Exec. Law § 290 (McKinney 1982); Or. Rev. Stat. Ann. § 659.020; Tenn. Code Ann. § 4-21-101 (1985); S.C. Code Ann. § 1-13-20 (Law Co-op 1986).

array of federal judicial, legislative and executive action taken in the last forty years to eradicate racial discrimination,[*] these policies testify that the country has come to agree that racial discrimination is intolerable. Overruling *Runyon*'s construction of § 1981 would therefore conflict with the prevailing sense of justice in this nation.

2. *No Intervening Events Since Runyon Undermine Its Validity or Make it Difficult to Apply.*

The Court has declined to follow a prior statutory interpretation when subsequent decisions or events have undermined the interpretation's authority to such an extent that its application serves to frustrate important congressional policies. For example, in *Boys Market* v. *Clerks Union*, 398 U.S. 235 (1970), the Court felt an "urgent need to reconsider its holding in *Sinclair Refining Company* v. *Atkinson*, 370 U.S. 195 (1962)" to resolve a serious problem created by the Court's intervening decision in *Avco Corp.* v. *Aero Lodge*, 735, 390 U.S. 557 (1968).

Sinclair held that the anti-injunction provision of the Norris-LaGuardia Act precluded a federal court from enjoining a strike prohibited under a collective bargaining agreement despite provisions in the agreement, enforceable under § 301(a) of the Labor Management Relations Act of 1947, calling for binding arbitration of the underlying grievance. 398 U.S. at 237-38. The Court subsequently held in *Avco* "that section 301(a) suits initially brought in state courts may be removed to the designated federal forum under the federal question removal jurisdiction in 28 U.S.C. section 1441." *Id.*, 398 U.S. at 244. The practical effect of these two holdings was to deprive state courts of jurisdiction in section 301(a) suits because unions, as a matter of course, would remove cases from state court to avoid injunctions against them, a result the Court found to be incompatible with existing case law and congressional purpose. *Id.*, 398 U.S. at 245 ("We are not

[*] *See Bob Jones University* v. *United States*, 461 U.S. *at* 592-96 (cataloguing decisions of this Court, congressional legislation, and executive orders in civil rights area). *See also*, Civil Rights Restoration Act of 1987, P.L. 100-259, 102 Stat. 28 (March 22, 1988).

at liberty thus to depart from the clearly expressed congressional policy to the contrary.").

The Court also considered the intervening societal and Congressional shifts that had taken place since enactment of the anti-injunction section of the Norris-LaGuardia Act in its decision to overrule *Sinclair*. It noted that "congressional emphasis had shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes" through arbitration. *Id.* Only the Court's assessment that the unavailability of injunctive relief undermined the effectiveness of arbitration and impeded the core purpose of the Norris-LaGuardia Act compelled it to overrule its prior reading of the Act in *Sinclair*."

In other instances where the court has departed from precedent, it has done so because experience or passage of time has proved the decision fundamentally flawed or unworkable. The Court has declined to adhere to precedent which thwarts, rather than fosters, predictability and efficiency. *See Monell* v. *Department of Social Services*, 436 U.S. 658 (1978); *Continental T.V. Inc.* v. *G.T.E. Sylvania Inc.*, 433 U.S. 36 (1977); *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970). This principle was cited by Justice Harlan speaking for a unanimous court in *Moragne*, 398 U.S. at 404-05, in which the Court overruled its holdings in *The Harriburg* and *The Tungus* which barred recovery for wrongful deaths at sea:

" There have been other instances where the Court has overruled a precedent because subsequent developments have placed it at odds with important congressional policies. *See, e.g., Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 365 (1976) (Court's decision in *Briggs-Stanton* permitting state regulation of partial strike activities held to be inconsistent with federal statutory scheme in which the use of economic pressure by the parties to a labor agreement is part and parcel of the process of collective bargaining); *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972) (Court's decision in *Moore* v. *Illinois Central R. R.* that railroad employees may elect state remedy rather than dispute resolution procedures under the Railway Labor Act frustrates congressional intent that resort to Arbitration Board be considered compulsory). *Cf., Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970) (Court's decision in *The Harriburg*, barring recovery for wrongful deaths at sea, sharply out of keeping with modern maritime law in light of intervening abandonment of the rule in most areas where it once had validity).

> *[T]he Harrisburg* ... has become an increasing unjustifiable anamoly as the law over the years has left it behind, and, in conjunction with its corollary, *The Tungus*, has produced litigation spawning confusion in an area that should be easily susceptible of more workable solutions. The rule has had a long opportunity to prove its acceptability, and instead has suffered universal criticism and wide repudiation. To supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication.

Justice Powell relied upon the same principle in *Continental T.V., Inc.*, 433 U.S. at 47-48 to overrule the holding in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 265 (1967), that vertical restrictions by manufacturers on areas or persons with whom a product may be traded are *per se* violations of the Sherman Act:

> Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The greater weight of scholarly opinion has been critical of the decision, and a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach.

Most recently, in *Monell* v. *Department of Social Services*, the Court overruled its holding in *Monroe* v. *Pape* that a local government may not be sued under 42 U.S.C § 1983 for injuries inflicted solely by its employees, in part, because of the inconsistency of its application. The Court noted: "[t]he principle of a blanket immunity established in *Monroe* cannot be cabined short of school boards. Yet such an extension would itself be inconsistent with recent expressions of congressional intent." *Id.*, 436 U.S. at 696.

None of the considerations compelling reexamination in the above cases is applicable to the Court's reconsideration of *Runyon*. No shift in congressional policy or other intervening events have undermined the validity of its holding that § 1981 prohibits discrimination in the private sector. Indeed, the Court in each decision since *Runyon* has reaffirmed, if not expanded, the broad

scope of § 1981. *See*, pp. 9 to 12, *ante*. And, the workability of the Court's interpretation in *Runyon* and its progeny has been duly tested by over a hundred applications in the lower courts. *See* pp. 16-20, *ante*; Comment, Development in the Law – Section 1981, 15 Harv. Civ. Rights – Civ. Lib. L. Rev. 29 (1980).

The issues of statutory construction raised by litigants since *Runyon* have been resolved consistent with the spirit of the Act. *St. Francis College* v. *Al-Khazraji*, 107 S. Ct. 2023 (1987) (definition of race discrimintion); *Goodman* v. *Lukens Steel Co.*, 107 S. Ct. 2617 (1987) (Section 1981 actions subject to state statutes of limitation for personal injury); *General Bldg. Contractors Ass.* v. *Pennsylvania*, 458 U.S. 100 (1982) (proof of intent required); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (white persons can invoke statute). Experience has proven the interpretation in *Runyon* to be "so consistent with the warp and woof of civil rights law as to be beyond question." *Monell*, 436 U.S. at 697.

3. ***This is Not a Situation in Which the Court Must Reexamine a Prior Construction Because its Application Works to Deny Substantial Rights.***

The Court's role as the final arbiter of justice confers upon it a special obligation to maintain fairness in the application of a rule of law. Thus, the Court has overruled precedent when its application works to deny substantial rights.

In *Peyton* v. *Rowe*, 391 U.S. 54 (1968), for example, the Court reconsidered a prior interpretation of 28 U.S.C. § 2241(c)(3) which specifies that a district court may issue writs of habeas corpus on behalf of prisoners who are "in custody" in violation of the Constitution. The issue was whether a federal court can entertain a petition from a prisoner incarcerated under consecutive sentences who claims one or more of the future sentences is a deprivation of constitutional rights. A prior decision, *McNully* v. *Hill*, 293 U.S. 131 (1934), held that it could not.

In analyzing whether the Court should reconsider *McNully*, Chief Justice Warren, writing for a unanimous court, emphasized the importance of the writ of habeas corpus as a symbol of the

right to individual liberty. The Court found that *McNully* undermined the purposes of the writ because it postponed plenary consideration of issues by the district court and extended, without practical justification, the time a prisoner entitled to release must remain in confinement. The Court concluded that it must overrule *McNully*, *inter alia*, because its holding "... represents an indefensible barrier to prompt adjudication of constitutional claims in the courts." *Id.* 391 U.S. at 55; *see also*, *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973).

Similarly in *Boys Market, Inc.* v. *Clerk's Union*, 398 U.S. at 245, the Court overruled precedent where its application had the unintended result of depriving parties of existing rights under state law since "[i]t would be ironic indeed if the very provision that Congress clearly intended to provide additional remedies for breach of collective-bargaining agreements has been employed to displace previously existing state remedies." *Id.*

The circumstances surrounding the Court's reconsideration of *Runyon* bear no resemblance to the circumstances which have compelled the Court to reexamine a prior construction because its application works to deny rights. Overruling *Runyon* would deprive citizens of existing protections and remedies which are not otherwise available. *See* pp. 16-21, *ante*. Moreover, the injustice that would result to victims of discrimination is not balanced by any legitimate claims by institutions in the private sector to be free from laws that restrain such discrimination. It is now clear that private institutions "simply cannot 'arrange their affairs' on an assumption" that they can deprive citizens of equal opportunities or benefits solely because of their race. *Monell*, 436 U.S. at 700.

We acknowledge the Court's admonition that in its reconsideration of this matter, civil rights litigants are subject to the same principles of *stare decisis* as other litigants and that the Court "should not be influenced by the worthiness of the litigant in terms of extra legal criteria." *Patterson* v. *McLean Credit Union*, ____ U.S. ____, ____ S. Ct. ____, (April 25, 1988) (per curiam). Indeed, as the Court observed, each Justice of the Court takes a solemn oath to "administer justice without respect to persons,

and to do equal right to the poor and to the rich ..." 28 U.S.C. § 453. *Id.*

Yet, it cannot be seriously questioned that in recent decades the citizens of the states have come to view this Court as playing a special role in protecting the rights of members of minority groups. This prevailing view is based in no small part upon the Court's decisions in *Jones* and *Runyon* which gave new life to the efforts of the 39th Congress to turn the promise of equality into reality for recently freed slaves. However radical those decisions may have been when viewed against the backdrop of the society of 1866, it cannot be doubted that they capture the consensus of a majority of Americans today.

To be sure, the national commitment to the eradication of racial discrimination has also been advanced by legislatures and executives, both state and federal. But the path to that consensus has never been straight and has sometimes been attended by conduct dedicated to obstructing it. It would therefore be unfortunate were this Court to signal a new direction for civil rights by restoring § 1981 through a statutory reinterpretation to a status it occupied when the views of another generation held that Congress lacked power to enact such legislation.* Though the availability of legislative reform of *Runyon*'s reversal gives reason for confidence that the commitment to civil rights will continue, no practical wisdom suggests that the commitment needs testing. Accordingly, we urge the Court to let stand its decision in *Runyon* v. *McCrary*.

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* *See Hodges* v. *United States*, 203 U.S. 1 (1906), overruled, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 441 n.78; *Civil Rights Cases*, 109 U.S. 3 (1883).

CONCLUSION

For the foregoing reasons, the Court should decline to reconsider the decision in *Runyon* v. *McCrary*.

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